Pendakwa Raya v Kang Ho Soh

HIGH COURT (SHAH ALAM) — PERBICARAAN JENAYAH NO 47–4–89
SHANKAR J
17 OCTOBER 1991

Criminal Procedure *— Arrest — 'Constructive' arrest — 'Legal' arrest — Whether distinction between the two terms exists — Dangerous Drugs Act 1952 s 37A*

Criminal Procedure *— First information report — Whether police officer's arrest report is first information report*

Criminal Procedure *— Trial — Accused charged with offence of trafficking in dangerous drug — Whether prosecution had made out case which if unrebutted warranted conviction*

Criminal Procedure *— Statement — Made by accused to police officer after arrest — Whether admissible — Dangerous Drugs Act 1952 s 37*

Evidence *— Corroboration — Arrest report of police officer — Whether admissible to corroborate evidence of officer*

Evidence *— Witness — Credibility — Whether previous inconsistent statement given in trial-within-a-trial admissible for purpose of attacking credibility*

Evidence *— Witness — Criminal trial — Prosecution witness not challenged or impeached — Whether must be accepted as truthful witness*

Evidence *— Rebutting evidence — Accused entering upon defence — Whether prosecution or court should call rebutting evidence — Criminal Procedure Code (FMS Cap 6) s 425*

Evidence *— Criminal trial — Proof — Standard of proof*

The accused was charged under s 39B of the Dangerous Drugs Act 1952 ('the Act') with trafficking in heroin. The accused was driving a car when he was stopped at a roadblock set up by the police acting on information received. The accused opened the car door when ordered to but refused to come out of the car and was forcibly pulled out by a police inspector and a police constable. A question arose as to whether what the accused had said to the police at the roadblock was made after he had been arrested and therefore inadmissible in evidence because the preconditions contained in s 37A of the Act had not been satisfied. The deputy public prosecutor and counsel for the defence cited various authorities in their submissions regarding the question.

The prosecution sought to adduce evidence that, after the arrest of the accused, and after a caution had been administered to him as required by s 37A of the Act, the accused had made a gesture to a policeman who was not of or above the rank of inspector, to the effect that the accused offered to the policemen money which was on his

person. The prosecution also sought to tender evidence that after the accused had been searched and when he was asked to sign the search list, he had said that he need not sign the list and that the policemen could keep the money.

At the close of the case for the prosecution, the issue before the court was as to whether in all the circumstances of the case the unrebutted evidence of the prosecution warranted the conclusion that the accused was in possession of the drugs found in the boot of the car.

The defence contended that as a certain prosecution witness was not challenged or impeached, the court should accept him as a witness of truth. The defence also contended that the failure of the prosecution to formally tender the arrest report of the police officer who had made the arrest was fatal to the prosecution case.

The accused was called on to enter his defence, and after the evidence for the defence had been completed, counsel for the defence in his final submission contended that even if the prosecution did not accept the accused's story or if the court harboured any doubts as to its veracity, the prosecution or the court could call rebutting evidence, presumably under s 425 of the Criminal Procedure Code (FMS Cap 6) ('the Code').

Another question which arose was as to whether a witness's previous inconsistent statement given in a trial-within-a-trial was admissible later to attack the credibility of the witness.

Held, acquitting the accused:

(1) That statements made by an accused person after his arrest are inadmissible, unless the statutory preconditions laid down by s 37A of the Act are satisfied, is a matter of law. But whether in a particular case a person was under actual arrest at a given moment of time is a question of fact, to be decided according to the circumstances of each case.

(2) The accused had already been arrested at the time that he made the statements. Since the police inspector had already successfully ordered the accused to stop and open the car door, and since he had formed the intention to compel the accused to move to his orders at that point in time, it would be correct to exclude everything the accused had said from then on.

(3) The distinction between 'constructive arrest' and 'legal arrest' was not helpful.

(4) A statement made by an accused person after his arrest to a police officer not of or above the rank of inspector is inadmissible.

(5) The evidence of the policeman to whom the gesture was allegedly made was his evidence of a gesture which was equivocal. Its prejudicial value far exceeded any probative value to the charge. The evidence regarding the accused's alleged refusal to sign the search list and his alleged invitation to the policeman to keep the money was highly prejudicial evidence with little probative value.

(6) Merely because the prosecution had called a witness who was not challenged or impeached, it did not follow that he must be accepted as truthful.

(7) At the close of the case for the prosecution, the court had made a finding that the accused was in possession of the drug. That finding was based on an objective assessment of the evidence. Possession implies and involves knowledge both of the drug and the nature thereof. That is what the accused had to rebut.

(8) What constitutes possession as specified in s 37 of the Act is a question of law. But whether in a particular case somebody was in possession of something is a question of fact.

(9) The arrest report made by the police officer who had effected the arrest was not a first information report. The prosecution could not even use the report to corroborate the evidence of the officer and therefore they could not put it in evidence.

(10) The very wide powers under s 425 of the Code should be very sparingly used and only in emergency cases.

(11) Previous inconsistent statements given even in a trial-within-a-trial must be admissible to attack credibility.

(12) In regard to the standard of proof, the task of the court was as to whether after considering all the evidence before it, the court believed the guilt of the accused to be so probable that any prudent man ought in the circumstances of the case to act on the supposition that it existed. In the present case, the required standard of proof had not been discharged.

[Bahasa Malaysia summary

Si tertuduh telah didakwa di bawah s 39(B) Akta Dadah Berbahaya 1952 ('Akta itu') kerana menyeludup dadah. Si tertuduh sedang memandu sebuah kereta apabila beliau diberhentikan di satu halangan jalanraya yang diadakan oleh polis yang bertindak mengikut penerangan yang diterima. Si tertuduh membuka pintu kereta itu apabila beliau diarah berbuat demikian tetapi enggan keluar daripada kereta dan telah ditarik keluar secara paksa oleh seorang inspektor polis dan seorang konstabel polis. Satu soalan timbul sama ada apa yang telah dikatakan oleh si tertuduh kepada polis di halangan jalanraya itu telah dibuat setelah beliau ditangkap dan lantaran itu tidak boleh diterima sebagai keterangan kerana prasyarat yang terkandung di dalam s 37A Akta itu tidak diikuti. Penolong pendakwa raya dan peguambela untuk pihak pembela telah merujuk kepada berbagai autoriti di dalam hujah mereka tentang soalan itu.

Pihak pendakwa cuba mengemukakan keterangan bahawa, selepas si tertuduh ditangkap, dan selepas amaran telah diberikan kepadanya seperti yang diperlukan oleh s 37A Akta itu, si tertuduh telah membuat suatu isyarat kepada seorang anggota polis yang bukan berperingkat atau di atas peringkat inspektor, yang menyarankan bahawa si tertuduh menawarkan kepada anggota polis itu wang yang ada pada dirinya. Pihak pendakwa juga cuba mengemukakan keterangan bahawa selepas

si tertuduh telah diperiksa dan apabila beliau dipanggil untuk menandatangani senarai pemeriksaan itu, beliau telah mengatakan bahawa beliau tidak perlu menandatangani senarai itu dan bahawa pihak polis boleh menyimpan wang itu.

Di akhir kes pihak pendakwa, isu di hadapan mahkamah ialah sama ada mengikut semua keadaan kes ini keterangan pihak pendakwa yang tidak dicabar menyokong kesimpulan bahawa si tertuduh mempunyai pemilikan ke atas dadah yang dijumpai dalam ruang belakang kereta itu. Si tertuduh telah dipanggil membuat pembelaannya, dan selepas keterangan bagi pihak pembela telah selesai, peguambela di dalam hujah penutupnya berhujah bahawa biarpun jika pihak pendakwa tidak menerima cerita si tertuduh atau jika mahkamah mempunyai sebarang kesangsian tentang kebenarannya, pihak pendakwa atau mahkamah boleh memanggil keterangan untuk mencabarnya, agaknya di bawah s 425 Kanun Acara Jenayah.

Satu soalan lagi yang timbul ialah sama ada satu pernyataan terdahulu yang bercanggahan yang diberikan oleh seseorang saksi semasa satu perbicaraan di dalam satu perbicaraan boleh diterima kemudiannya untuk menyerang kebolehpercayaan saksi itu.

Diputuskan, membebaskan si tertuduh itu:

(1) Sama ada pernyataan yang dibuat oleh seorang yang dituduh selepas penangkapannya tidak boleh diterima, melainkan jika prasyarat statutori yang digariskan oleh s 37A Akta itu diikuti, adalah satu soalan undang–undang. Tetapi sama ada dalam sesuatu kes tertentu seseorang itu berada di bawah penangkapan sebenar pada sesuatu masa yang tertentu, adalah satu soalan fakta, yang harus diputuskan mengikut keadaan kes itu.

(2) Si tertuduh telah pun ditangkap ketika beliau membuat pernyataan itu. Memandangkan inspektor polis telah berjaya memerintahkan si tertuduh berhenti dan membuka pintu keretanya, dan memandangkan yang beliau telah membentuk niat untuk memaksa si tertuduh mengikut perintahnya pada ketika itu, memanglah betul yang kesemua yang telah dikatakan oleh si tertuduh selepas ketika itu tidak diterima.

(3) Pembezaan di antara 'constructive arrest' dan 'legal arrest' tidak mendatangkan faedah.

(4) Satu pernyataan yang dibuat oleh seorang si tertuduh selepas penangkapannya kepada seorang anggota polis yang bukan berperingkat atau di atas peringkat inspektor tidak boleh diterima.

(5) Keterangan anggota polis yang kononnya telah menerima isyarat itu adalah keterangannya sendiri tentang satu isyarat yang tidak tentu maksudnya. Nilai prejudisnya jauh melebihi sebarang nilai probatifnya terhadap dakwaan itu. Keterangan tentang keengganan si tertuduh menandatangani senarai pemeriksaan dan jemputannya kepada pihak polis untuk menyimpan wang itu adalah keterangan yang sangat berat kesan prejudisnya dengan nilai probatif yang rendah.

(6) Cuma kerana pihak pendakwa telah memanggil seorang saksi yang tidak dicabar atau disoal kebolehpercayaannya, tidak bermakna yang beliau mesti diterima sebagai benar.

(7) Di akhir kes pihak pendakwa, mahkamah telah membuat pendapat bahawa si tertuduh mempunyai pemilikan ke atas dadah itu. Pendapat itu berasaskan pentaksiran objektif keterangan yang ada. Pemilikan menyarankan dan melibatkan pengetahuan tentang kedua-dua dadah itu dan sifatnya. Itulah yang mesti dicabar oleh si tertuduh.

(8) Apa yang merupakan pemilikan seperti yang diperuntukkan oleh s 37 Akta itu adalah satu soalan undang-undang. Tetapi sama ada dalam sesuatu kes tertentu seseorang itu berada dalam pemilikan sesuatu benda adalah satu soalan fakta.

(9) Laporan penangkapan yang dibuat oleh pegawai polis yang telah menjalankan penangkapan itu bukan satu laporan penerangan pertama. Pihak pendakwa tidak pun boleh menggunakan laporan itu untuk menyokong keterangan pegawai itu dan lantaran itu mereka tidak boleh mengemukakannya sebagai keterangan.

(10) Kuasa yang sungguh lebar di bawah s 425 Kanun itu mestilah jarang-jarang digunakan dan digunakan cuma dalam kes kecemasan.

(11) Pernyataan terdahulu yang bercanggahan yang diberikan biarpun semasa satu perbicaraan di dalam satu perbicaraan mesti boleh diterima untuk mencabar kebolehpercayaan.

(12) Berkenaan taraf pembuktian, tugas mahkamah adalah sama ada selepas mempertimbangkan semua keterangan di hadapannya, mahkamah mempercayai kesalahan si tertuduh sebagai begitu mungkin sekali sehinggakan mana-mana orang yang munasabah patut dalam keadaan kes itu bertindak atas anggapan bahawa ia wujud. Di dalam kes ini, taraf pembuktian yang diperlukan tidak dipenuhi.]

Cases referred to

1 *PP v Saubin Beatrice* [1983] 1 MLJ 307 (refd)
2 *Lim Seng Chuan v PP* [1977] 1 MLJ 171 (refd)
3 *PP v Rosyatimah bte Neza & Anor* [1989] 1 MLJ 360 (refd)
4 *PP v Tan Seow Chuan* [1985] 1 MLJ 318 (refd)
5 *Tan Shu En & Anor v PP* [1948] MLJ 196 (refd)
6 *Sambu v Rex* [1947] MLJ 16 (refd)
7 *Krishnan v PP* [1987] 1 MLJ 292 (refd)
8 *PP v Neoh Wan Kee* [1985] 1 MLJ 368 (refd)
9 *Jayaraman v PP* [1982] 2 MLJ 306 (refd)
10 *PP v Aris bin Yunus* [1989] 1 CLJ 239 (refd)
11 *PP v Lim Kim Ann*[1988] 1 MLJ 401 (refd)
12 *PP v Tan Chye Joo* [1989] 2 MLJ 253 (refd)
13 *KJ Barlow v PP* [1986] 2 MLJ 104 (refd)
14 *PP v Salleh bin Saad* [1983] 2 MLJ 164 (refd)
15 *PP v Law Say Teck* [1971] 1 MLJ 199 (refd)
16 *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743 (refd)

17 *Lim Kah Wan v PP* [1985] 2 CLJ 473 (refd)
18 *Noor Mohamed v The King* [1949] AC 182 (refd)
19 *PP v Haji Kassim* [1971] 2 MLJ 115 (refd)
20 *PP v Paneerselvan & Ors* [1991] 1 MLJ 106 (refd)
21 *Haw Tua Tau v PP* [1981] 2 MLJ 49 (refd)
22 *Munusamy v PP* [1987] 1 MLJ 492 (folld)
23 *Mohamed Radhi bin Yaacob v PP* [1991] 3 MLJ 169 (refd)
24 *PP v Ergamparam a/l Kanniah* Selangor Criminal Trial No 58–9–87 (unreported) (refd)
25 *Pavone v PP* [1984] 1 MLJ 77 (refd)
26 *Tong Peng Hong v PP* [1955] MLJ 232 (refd)
27 *Syed Ali bin Syed Abdul Hamid & Anor v PP* [1982] 1 MLJ 132 (refd)
28 *Yee Ya Mang v PP* [1972] 1 MLJ 120 (refd)
29 *PP v Badrulsham bin Baharom* [1988] 2 MLJ 585 (refd)
30 *Su Ah Ping v PP* [1980] 1 MLJ 75 (refd)
31 *Pavone v PP (No 2)* [1968] 1 MLJ 423 (distd)
32 *Wong Swee Chin v PP* [1981] 1 MLJ 212 (refd)
33 *Abdul Jalil bin Abdul Satar v PP* [1991] 2 MLJ 194 (distd)
34 *PP v Mohamad Said* [1984] 1 MLJ 50 (distd)
35 *Tan Cheng Kooi & Anor v PP* [1972] 2 MLJ 115 (refd)
36 *PP v Lee Ah Ha* [1989] 1 MLJ 120 (refd)
37 *Karthiyayani & Anor v Lee Leong Sin & Anor* [1975] 1 MLJ 119 (refd)
38 *PP v Mohd Fuzi bin Wan Teh & Anor* [1989] 2 CLJ 652 (refd)
39 *Mat v PP* [1963] MLJ 263 (refd)
40 *Saad Ibrahim v PP* [1968] 1 MLJ 158 (refd)
41 *Wong Chooi v PP* [1967] 2 MLJ 180 (refd)
42 *Iradarasa v PP* [1972] 2 MLJ 47 (refd)
43 *PR v Saad bin Othman* Perak High Court Criminal Trial 58–8–86, Supreme Court Criminal Appeal No 05–124–90 (unreported) (refd)
44 *Chang Kim Siong v PP* [1968] 1 MLJ 36 (refd)
45 *Dato' Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232 (refd)
46 *R v Frost* (1839) 9 C & P 129 (refd)

Rusli Zain (Deputy Public Prosecutor) for the public prosecutor.
Bachan Singh (*Kartar Singh* with him) (*Bachan & Kartar*) for the accused.

Cur Adv Vult

Shankar J: In the present case, Kang Ho Soh ('Kang') was charged with trafficking in 1,915.05g of heroin under s 39B of the Dangerous Drugs Act 1952 ('the Act'). Bearing in mind that possession of 15g is enough to presume trafficking there was enough to put 127 people in jeopardy of their lives if the stuff was distributed equally amongst them. The gross weight of the subject matter of the charge was 2,247.09g. We are therefore concerned with a substance of over 85% purity. The cash value of this must have been

very considerable, considering that 534g of heroin in 1980 had a street value of $1.2m. (See *PP v Saubin Beatrice.*[1])

In a nutshell, the prosecution case against Kang was that on 4 March 1989, Kang was driving a BMW car No WAA 5159 at the 12th kilometre Kuala Lumpur – Rawang Highway. Acting on information received, Insp Ma'anor bin Yusof (PW2), assisted by five policemen, had set up a road-block and stopped the car. When the boot was opened a big red shopping bag (exh P34) was seen within. Inside the bag were found two large white transparent plastic bags, containing a white powder (exh P35 and exh P36) and five smaller packages (exhs P35 to P41) totally enclosed in opaque yellow scotch tape. These five smaller packages contained the heroin which is the subject matter of the charge.

At the close of the prosecution case I called upon Kang to enter upon his defence. I did so because despite some infirmities therein, I found that the prosecution had made out a case against the accused which if unrebutted would have warranted his conviction. I now give my reasons for the rulings which I made up to that point.

The defence objected to the admissibility of everything Kang said to PW2 from the time he was stopped at the road-block on the ground that as from that moment he should be treated as if he was under arrest. A trial-within-a-trial was held to determine this issue. (See *Lim Seng Chuan v PP.*[2])

PW2 said that he was acting on information which he had received the previous night. On arrival at the roadblock the car was stopped. Then PW2 identified himself and ordered Kang to come out of the car. Kang opened the door. He asked, 'Apa salah saya?' PW2 replied that he wanted Kang to come out of the car because he wanted to examine the contents of the boot. Kang clung on to the steering wheel and refused to come out. A struggle then took place. PW2 and Constable Ahmad bin Haji Din (PW3) forcibly pulled Kang out of the car. In the course of this struggle Kang received an injury to his head which started to bleed. PW2 then said that he (PW2) took out the car keys and handed it to Kang who walked to the back of the car and opened the boot. Inside, PW2 saw the big red bag (exh P34) but not its contents, as the mouth of the bag was facing inwards. He asked Kang whose bag it was. Kang allegedly spontaneously replied, 'Saya punya.' Then Kang was made to sit in the back of the car between PW3 and Detective Corporal Azami. PW2 then himself drove the car further on the dual carriageway, made a U-turn and brought the car back to a place nearby opposite the roadblock.

Here it was parked on the verge and the party got out. Once again PW2 gave the keys to Kang and asked him to open the boot. Kang did so. Then PW2 asked Kang to take out the contents of the bag (exh P34) one by one. There were two big transparent plastic bags containing a white powder (exhs P35 and P36) and the five smaller packets (exhs P37 to P41). PW2 asked Kang several times what these contained. This time after some hesitation, Kang is alleged to have said that the two white bags contained caffeine, and the five packets contained heroin base.

I would pause at this stage to observe that at no stage of PW2's evidence-in-chief up to this point was there anything said about any struggle. That evidence came out in cross-examination when he was confronted by de-

A fence counsel with a police report (referred to as the arrest report) which PW2 made around 4.25pm that afternoon. This report says in so many words that PW2 had ordered Kang to stop and to open the door of the car.

Kang did not give any evidence in the trial-within-a-trial. Defence counsel relied upon his submission and cited the authorities I have listed [cases (2) to (10) and (15) under 'Cases referred to' in the headnote to this B judgment]. The learned DPP distinguished the facts in each of these cases and cited the authorities listed [see cases (11) to (14) under 'Cases referred to'].

With respect to the industry of counsel and the DPP I feel I ought to say something here about the system of judicial precedent. That statements C made by an accused person after his arrest are inadmissible, unless the statutory preconditions laid down by s 37A of the Act are satisfied, is of course a matter of law. But whether in a particular case a person was under actual arrest at a given moment in time is a question of fact, to be decided according to the circumstances of each case. It is well established that the reasons given by a judge for arriving at a conclusion of fact, is not to be D treated as law and therefore citable. Failure to appreciate this can result in the court being crushed under the weight of its own reports. (See *Qualcast (Wolverhampton) Ltd v Haynes*[16] at pp 757, 758, 759 and 761.)

In the present case, the evidence makes it clear that on the basis of his information received, PW2 was prepared to back up with physical force, his E order to the accused to stop and open the door with the direct objective that the boot of the car be opened for search. And he did so. Consequently I ruled that everything the accused said from the moment PW2 laid hands on him was inadmissible. In retrospect I would state it is my opinion that since PW2 had already successfully ordered Kang to stop and open the car door, and since he had formed the intention to compel Kang to move to his F orders from that point in time, it would be more correct to exclude everything the accused said from then on.

As to all the various authorities cited to me I am constrained to say that I regard each of them as being a decision on the facts of that particular case on the issue as to when a person is to be regarded as being under arrest for G the purpose of s 37A of the Act. I have not found the distinction between 'constructive arrest' and 'legal arrest' helpful. It was contended by the learned DPP that in the present case Kang could only be regarded as being under arrest when PW2 so ordered after Kang allegedly admitted to the knowledge of the contents of the packages. With respect I do not agree that stopping a person to make enquiries, is the same as stopping a particular H person on the basis of prior information received that that particular person has committed a particular offence.

After Kang was handcuffed PW2 says he cautioned the accused and transferred exh P34 and its contents to the floor of the front passenger seat. He himself got into the driver's seat. Kang was put into the back seat with I PW3 to Kang's left and Azami Osman to his right. Then they drove to CAD Headquarters.

Relying on the caution allegedly administered by PW2, the DPP sought to admit evidence of an incident that took place en route. Kang is said to have pouted his mouth towards his stomach so as to direct PW3's attention

in that direction. PW3 then felt Kang's waist and found, between the trouser waistband and his underclothes on either side of his midline, sizeable bundles of money. The prosecution sought to adduce evidence that PW3 then said to PW2 that Kang wanted to give them money. I held this evidence inadmissible because as a 'statement' of an accused person it was not made to a person above the rank of Inspector. In any case it was PW3's interpretation of a gesture which was equivocal. Its prejudicial value far exceeded any probative value to the charge. (See *Lim Kah Wan v PP*;[17] *Noor Mohamed v The King*;[18] *PP v Haji Kassim*;[19] and *PP v Paneerselvan & Ors.*[20])

Once at Headquarters PW2 searched the accused's person. A very large quantity of cash was recovered therefrom. The search list put up by PW2 was put in as exh P7 showing the time of search of the boot of the car at 3.15pm and the search of the accused at 4.15pm. $30,387 was recovered in various denominations, plus some small units of foreign currency and an old $10 note. All the exhibits were locked up in PW2's steel cabinet to which he alone had the key. It is stated that when the accused was asked to sign the search list exh P7 he at first declined and said, 'Tak payah tulis. Tuan boleh ambil itu wang.' For the purposes of this case I excluded this alleged statement from consideration as to whether the prosecution had proved its case. Even if it was said, it is highly prejudicial evidence with little probative value.

Then PW2 proceeded with the accused to his house and at 5.20pm PW2 searched the accused's house at the first floor of No 2 Jalan SJ 3 Selayang Jaya Selangor. The items recovered were entered into another search list: exh P8.

PW2 then returned to Headquarters and at 9pm the same evening all the exhibits were handed over to the IO Insp Shaffiee Husin (PW4) together with the accused. A handover list (exh P9) was prepared and signed by both PW2 and the IO.

The IO in this case was PW4. His evidence was that after he received the exhibits from PW2 on 4 March, he kept them in safe custody until 7 March 1989 when they were taken out to be photographed by PW1. They were then put back into safe custody until 9 March 1989 when they were sent to the chemist in a sealed package. On 22 May 1989 the same package was received, now with the seals of the Chemistry Department. This was kept in safe custody until it was brought to court on the day of the trial. The chemist's report was served on the accused in good time and no notice was served requiring him to be cross-examined. So the report was tendered in evidence as exh P49.

PW2 was cross-examined again by defence counsel in the main trial. Initially defence counsel put to PW2 that he and his men had pulled Kang out of the car and assaulted him. This was denied. Then it was stated that the defence case was that the accused had not been pulled out at all. This was also denied. PW2 maintained that there had been a struggle during which the accused was injured. It was then put that the accused had come out of the car voluntarily without any struggle and that once he had come out he asked 'Apa salah saya buat' whereupon he was set upon by PW2 and beaten. The wound on the accused's head was allegedly caused by his being struck with a pair of handcuffs by one of PW2's men. It was put that the

A accused was then handcuffed with his hands at the back and nothing was done as regards the boot till the car was taken to the other side of the road. It was further put that no caution had been administered at all.

Through PW2 defence counsel also established that one Insp Ramli had accompanied him to Kang's house the same afternoon; and that this Ramli had been dismissed from the force. It was put to PW2 that this Insp Ramli B had pushed the accused's fingers into the contents of the exhs P37–41 and then proceeded to cut the accused's finger nails. PW2 said that he was with the accused that night and he had no knowledge of this. He swore that at no time had exhs P37 to 41 been opened.

One observation which has to be made of this cross-examination is that C whilst he was cross-questioned at great length about the contents of his arrest report, the document was not sought to be put in by the defence. The other is that although PW2 did say in his report that the two bags of caffeine weighed 2.6kg each and the five packets of heroin weighed 2.33kg he was not asked how he had arrived at these figures, which went on record at 4.25pm that day.

D After production for a remand order Kang first appeared in the magistrate's court on 17 March 1989 where he was charged with trafficking in five blocks of heroin having a gross weight of 2.33kg and two plastic bundles of caffeine each weighing 2.6kg. Caffeine is not a dangerous drug. In this court Kang was charged on 7 December 1989 with trafficking in the E net weight of the heroin found in the boot of the car.

The prosecution called Teh Chong Hock ('Teh') (PW5). This man is the accused's brother-in-law; he says he is a fishmonger. He was the registered owner of the car at the material time. He lives at the same address as the accused but on a different floor. He says he lent the car to the accused from 11 to 12 noon on 4 March 1989. Before he did so he says he did not F put the offending items into the boot. He had never seen exhs P34–P41 before. They were not his. He alone kept the car keys of which he has two sets. The accused often borrowed the car. In cross-examination he said that on 3 March 1989 he lent the car to one Ah Cheong sometime between 7 and 8pm. When Ah Cheong returned the car the next morning between 9 G and 10am, he (PW5) did not examine the car. This Ah Cheong said he wished to borrow the car again that night. This of course is pure hearsay. He is said to have come that night but the car did not return.

In answer to the court Teh said that until 8am on the morning of 4 March 1989 he was at the Pasar Borong. Thereafter he was at home until 2pm. This evidence was not challenged by the defence.

H Two other witnesses called by the prosecution must now be dealt with. PW6 was a man named Ong Hock Hoe. He appeared unwilling to admit to anything except his proper name. He denied his nickname was Tua Pooi Kia, that he had met the accused in Kuala Lumpur on 4 March 1989, that he had seen the bag exh P34 before or its contents, and most importantly I that he had handed the bag and its contents to the accused at any time on 4 March 1989.

PW7 was called Tan Hock Chai. He admitted he had seen PW6 before and knew him to be called Ah Too. He admitted he was passing through Kuala Lumpur on 4 March 1989. He also denied that he had ever seen the

bag exh P34 or its contents exhs P35 to P41, or that he had handed the same to PW6 on 4 March 1989 in order that it be handed over to the accused. A

Neither of these two witnesses were cross-examined by the defence. After PW7 had given his evidence PW6 was recalled by the prosecution and now admitted that his name was Ah Too. Both these witnesses were very frightened men and it was patently obvious that they had both been intimidated and were giving evidence under grave apprehension. B

I had occasion to call upon two people in the public gallery to identify themselves because of the manner in which they were pointedly staring at these two witnesses. Where hostility is sensed from the people in the public gallery, consideration may need to be given on future occasions if the trial should not proceed in camera. What was not clear in the present case is precisely where the intimidation was coming from. The questions put by the prosecution, however, were significant. C

I must now say why I called for the defence despite the infirmities imputed to the prosecution case by the defence.

As to the onus of proof and the problems caused by *Haw Tua Tau v PP*[21] at p 52, I hold myself bound by *Munusamy v PP*,[22] which was followed in *Mohamed Radhi bin Yaacob v PP*.[23] To cite a plethora of other authorities on this point is superfluous and can be confusing. I would take this opportunity of putting the record straight as regards my decision in *PP v Ergamparam a/l Kanniah*[24] where after calling upon the defence I acquitted the accused even though he gave no evidence. I there referred to the decision of Edgar Joseph Jr J in *Pavone v PP*[25] at p 79. With the wisdom of hindsight let me state now that where the *only* evidence against an accused person is that led by the prosecution it would be a contradiction in terms to say that it is enough to call for the defence, but not enough to convict him if the accused chose to remain silent and called no other evidence. D E F

Because the bag was not concealed in some hidden compartment in the car but was openly carried in the boot it was submitted that none of the presumptions contained in s 37 of the Act could assist the prosecution because the car did not belong to the accused but had only been borrowed by him a few hours before he was arrested. G

The issue before the court, however, was whether in all the circumstances of the case the unrebutted evidence of the prosecution warranted the conclusion that the accused was in possession of the drugs found in the boot of the car. If he was, then s 37(da) of the Act required it to be presumed that he was trafficking because the quantity was in excess of 15g. The second limb of s 37(d) as to knowledge of the nature of the drug would also become applicable. H

Tong Peng Hong v PP[26] and *Syed Ali bin Syed Abdul Hamid & Anor v PP*[27] were cited by the defence to contend that a person who has control and custody of a car cannot be said to be in presumptive possession of something in the boot. Both cases were read out at length. In the first case opium in a small leather bag was placed in a box under the seat of the cab. In the second case opium was found concealed behind the back of the rear seat of the car. In both cases the court held that the presumption under s 37(d) of the Ordinance did not apply because a vehicle cannot be equated to I

A 'anything whatsoever' specified in that subsection. So it followed on the facts of those cases that custody and control of the vehicle could not be presumptively equated to custody and control of drugs concealed in the vehicle.

With respect to counsel, those cases do not decide that in all cases a person who is in sole charge of a vehicle cannot be found to be in possession B of articles being carried in it. As Thomson J himself said in *Tong Peng Hong v PP*[26] at p 233:

> If something be found, for example, in a bag which I am carrying or in a box to which I hold the key it is extremely reasonable to suppose, unless I produce some satisfactory evidence to the contrary, that I know all about it ...

C

Again, at p 234:

> I am not saying for one moment that a drug may not be found in a vehicle in such circumstances as would in the absence of disproof or explanation lead the court to the conclusion, quite independently of any statutory presumption, that it was in the possession of the person in control of the vehicle.

D

What constitutes 'possession' as specified in s 37 of the Act is a question of law. (See, for example, the definition of possession in *Yee Ya Mang v PP*.[28] Also, the very comprehensive treatment of Lim Beng Choon J in *PP v Badrulsham bin Baharom*.[29]) But whether in a particular case somebody was E in possession of something is a question of fact. As I have said earlier, and I say again now, a judge's reasoning on the facts is not a judicial precedent to be elevated to a proposition of law and to be cited as authority. I therefore did not find the parallels which counsel or the DPP sought to draw between the facts in similar cases particularly helpful.

The material evidence as far as possession was concerned was as follows. F The accused had taken the car from his brother-in-law, PW5 Teh Chong Hock, between 11am and 12 noon. This was at Taman Selayang Jaya. He had gone into town and was on his way back when he was stopped at the roadblock, ie he had custody and control of the car for three to four hours. He also had the key to the boot of the car. I would emphasize this fact G because it narrows the area of control and custody to a container to which he alone had the key at the material time. Furthermore, the unrebutted evidence was that immediately after PW2 told the accused that he wanted to open the boot the accused resisted coming out of the vehicle. PW3 corroborated PW2's evidence on this point. The evidence was not inherently incredible. Unrebutted it led to the irresistible inference that the H accused knew what was in the boot.

I would say here also that the suggestion by the defence that Ah Cheong had casually left the drugs in the car before he returned it to PW5 on the morning of 3 March 1989 is inherently incredible because the quantity is so very large and its value was so very considerable. In any case this is just a I suggestion.

The defence contends that because PW5 was not challenged or impeached the court should accept him as a witness of truth. If the prosecution was not relying upon his testimony it is contended that they should not have called him. As to this I hold that merely because the prosecution has

called a witness it does not follow that he must be accepted as truthful. Teh Chong Hock is the accused's brother-in-law. I was not satisfied with the manner in which he answered the questions put to him. I have reservations as to whether he is a truthful person.

The other infirmities upon which the defence relied did not result in a failure of the prosecution case. I will deal with them now.

According to the chemist's report the two bags of caffeine together weighed just over 4.5kg whereas in PW2's police report he stated the weight to be 2.6kg each. So it was submitted that there had been some interference with the exhibits. There is no evidence before the court as to where PW2 got his weights from. He was not cross-examined on this at all. The weights could have been got from some source of evidence which was inadmissible. In any case the caffeine is not the subject matter of the charge. PW4 testified that he sent the very same exhibits handed to him by PW2 to the chemist. (See *Su Ah Ping v PP.*[30]) I therefore regarded these criticisms as being of no consequence and consider *Pavone v PP (No 2)*[31] inapplicable.

Next it was submitted that the failure to call Insp Ramli or at least offer him to the defence should result in an adverse inference against the prosecution. But PW2's evidence was that this man had only accompanied him to the accused's house in order to help guard the accused. He had no other role in the investigations whatsoever. The defence's imputation that Insp Ramli had put the accused's hands into exhs P37 to P41 and then cut his fingernails for submission for chemical analysis was not supported either by the chemist's report which makes no mention of any fingernails or by the exhibits themselves. Each of them was closed and wrapped with sealing tape. If they had been cut open before submission to the chemist then I think the chemist would have said so in the report. Furthermore, Insp Ramli only accompanied PW2 to the scene. On his return PW2 surrendered all the exhibits which he had earlier locked up in his steel cabinet together with the search lists and the accused to the IO. There is sworn testimony from PW2 that Ramli was not allowed to interfere with the exhibits. I therefore was of the view that this attack was inconsequential.

There was no evidence before me as to why Ramli was dismissed from the Force. It was not put to any prosecution witness that he was dismissed because of some misconduct in connection with this case. On 5 August 1991 the prosecution applied to this court to subpoena him for this hearing. PW4, the IO, gave evidence that he made efforts to trace him. But he could not be served. PW4 was not cross-examined on this aspect of his evidence. (See *Wong Swee Chin v PP.*[32]) Ramli was not a key witness and the reason for the failure to make him available was explained. So this attack also fails. *Abdul Jalil bin Abdul Satar v PP*[33] and *PP v Mohamed Said*[34] are cases which deal with non-production of key witnesses without whom the prosecution case could not stand.

The next line of attack was that the failure of the prosecution to formally tender the arrest report of PW2 was fatal. *Tan Cheng Kooi & Anor v PP*[35] and *PP v Lee Ah Ha*[36] were cited as authorities. I regret to say I found this submission unworthy of serious consideration. PW2's so-called report was not a first information report. It was an 'arrest' report, a copy of which had

A been supplied to the defence. Indeed they cross-examined on it using it as a previous statement which they could use to contradict PW2. The prosecution could not even use the report to corroborate PW2. (See *Karthiyayani & Anor v Lee Leong Sin & Anor.*[37]) So how could they put it in as evidence?

The last line of attack was on the caution given by PW2 after he had formally arrested the accused. It was submitted that in the absence of B evidence that it was explained to the accused the statements made thereafter are inadmissible: see *PP v Mohd Fuzi bin Wan Teh & Anor.*[38] As I have disregarded whatever the accused said or is alleged to have meant to say after this event, I do not need to decide this.

My finding that the prosecution had made out a case which would C warrant his conviction meant that in all the circumstances of the case I had made a finding of fact that he was in possession of the drugs in the boot. This finding was based on an objective assessment of the evidence. Possession implies and involves knowledge both of the drugs and the nature thereof. That is what the accused had to rebut. He elected to give evidence on oath.

D The accused was not asked anything in his examination-in-chief as to his occupation in March 1989. The substance of his testimony in chief was that he lived with his wife and four children on the first floor of No 2 Jalan 3 Taman Selayang Jaya. His brother-in-law, Teh Chong Hock (PW5), stayed on the second floor. His brother also stayed on the second floor. On 4 E March 1989 he had woken up at about 10am. A friend called Kian Seng telephoned him. He then borrowed the car from PW5 and went to meet this Kian Seng at about 11am. He failed to meet him and returned home. He reached the house at about 12 noon. Then another friend called Ngan Chye called him to repay some money this Ngan Chye had borrowed from him at Genting. So he left the house again in the same car and met Ngan Chye F near the General Hospital. Here they went to have a cup of coffee. Ngan Chye paid him back. Then at 2pm the accused left that place and returned home.

The accused's account of what happened at the roadblock is as follows. When he was stopped, he wound down his window. On being told that the G person who stopped him was the police, he opened the door and got out. After he had got down five men rushed towards him and started to beat him and kick him. One of them hit him on the head with his handcuffs. He asked, 'Apa salah saya?' Then he was handcuffed with his hands at the back. He was then seated at the rear of the car between two policemen. The car was driven to the other side of the road. Here they got out. The H accused's hands were released and then rehandcuffed in front. Then he was asked to open the boot where he saw the bag exh P34 for the first time. He was asked to take out the contents which he says he did. He says he was asked to count the packets which he did. There was one big packet and five small ones. No caution was administered. They then drove to the police I station. From here he was taken to his house where it was searched. Upon his return to the police station he says Insp Ramli came to see him. One of the packets exhs P37–41 was already opened. He took each one of the accused's fingers one by one and poked it into this packet. He claims the

packet had been cut open. After this, Insp Ramli is said to have cut the accused's fingernails. The accused says he does not know who placed the drugs in the car. He had not noticed it there earlier.

In his cross-examination, the accused's answers about his occupation and his mode of living and his earnings were evasive and quite unsatisfactory. At the time of his arrest and for about five to six years before that he said he was an odd job labourer. Before that he was a lorry driver for about four years earning $600 to $700 per month. Before that he was a butcher for about ten years earning about $300 per month. (According to the charge sheet the accused was 42 years old in March 1989.) His brother ran a minimarket on the ground floor of his residence. The accused says that as an odd job labourer he helped in this shop but he had no fixed earnings. Whenever the accused needed money he just helped himself. No records were kept of how much he took. The rent for the accused's residence was paid by his brother. So much for his occupation in 1989.

Between 1979 and 1980 the accused claimed to have won some $240,000 in 4-Digit gambling using three numbers. These were 1433, 9425 and 3728. But he could not remember into which bank accounts he paid these moneys. Then he said he only had two accounts.

To support this the accused tendered in re-examination photostat copies of cheques beginning from 16 June 1980 to 5 January 1981 for sums totalling $352,510. He says he had two bank accounts into which he paid his winnings. Two passbooks were seized from his room. One with Malayan Banking Bhd (exh P26) is in the joint names of the accused and Teh Chong Hock from 26 March 1981 to 27 August 1982. The other (exh P25) is in the name of the accused and Kang Joo Huat, with the Hongkong & Shanghai Bank from 24 July 1980 to 22 January 1982.

The car WAA 5159 was initially registered in the accused's name. It was transferred in 1987 to PW5. On the date of the offence, however, the registration book for the car was found in the accused's room. It was put that this was because the ownership of the car was claimed by the accused. This he denied. But when asked to explain why he was holding the card he at first said he did so to pay the road tax which he did in November or December 1988. When he discovered that his answer did not tally with the registration card he said the tax was paid by his brother and that he had never paid road tax before. My finding here is that he lied about the reason why the registration card was found in his room. Furthermore, if the car belonged to PW5 who was his brother-in-law, why should the road tax be paid by his brother?

As to his movements on 3 and 4 March 1989 he claimed that on the previous day he was in Genting with Ngan Chye. The accused says he won $28,000 at Baccarat in a single sitting, a game in which he says only two cards are used and 9 is the biggest. Out of this he lent $15,000 and then $10,000 to this Ngan Chye at Genting between 6 to 7pm.

As to his movements on Saturday, 4 March 1989, his first caller was one Kian Seng, a cake seller at the Sentul Market who stays in Gombak. At first he said he went to see him to ask him which horse to bet. Then he said he went to talk to him, not about horses, but of Genting Highland. The answers are so contradictory that I must hold that again he lied.

When the accused returned from Sentul because Kian Seng had already gone home, he says he kept the keys of the car and did not return it to PW5 Teh Chong Hock because PW5 was not at home. This answer is in direct contradiction to PW5's evidence that he was at home till 2pm.

When Ngan Chye called him, the accused says he was asked to go and collect the money at the flat called 17th Floor Flat near the General Hospital. But he does not know Ngan Chye's full name. He knows Ngan Chye lives in Ipoh Road but he does not know the address. He later said he could find his way there. Ngan Chye is a sub-contractor whom he claimed to have known for five to six years.

The accused said if he wanted to meet Ngan Chye he has never looked for him. Ngan Chye called him from the 17th Floor Flat and asked him to go there, and so he went there. But elsewhere in his cross-examination he says he went to the bus station at the flat and Ngan Chye was having his lunch there. Here Ngan Chye gave him $25,000 in an envelope which he put into his trouser-pocket. The money which was identified by the accused (exhs P10 and P11) was found in two lots on either side of his navel.

The prosecution put to the accused that Kian Seng and Ngan Chye did not exist and that in fact he was using the car that day to transport drugs and that the money found on him was used for the business of trafficking in drugs. This the accused naturally denied.

The accused called one witness, the court interpreter who was asked to read some faint Chinese characters written on the bag. This was Ng Choon Kiat or Wong Choon Kit — the name of a person. I hold this is neutral. Nobody intending to use a bag to carry drugs would put his name on it.

I have now come to the final stage of this case which is to decide if the accused has rebutted the prosecution case.

Defence counsel cited several authorities on the onus of proof on the defence (see *Mat v PP*;[39] *Saad Ibrahim v PP*;[40] *Wong Chooi v PP*;[41] *Iradarasa v PP*;[42] *PR v Saad bin Othman*;[43] *Chang Kim Siong v PP*;[44] *Dato' Mokhtar bin Hashim & Anor v PP*[45]) and the absence of any obligation on the part of the accused to call any witnesses. All these I have considered and would respond as follows.

First I must deal with the mass of photostat cheques put in as exh D35, allegedly to prove that between 16 June 1980 and 22 April 1981 the accused was paid $352,510 on 4-Digit winnings. Whilst the accused is under no duty to call any witnesses, the provisions of the Evidence Act 1950 as to the mode of proof of any document applies equally both to the prosecution and the defence. In the absence of any evidence from the makers of these documents (ie the bank officials concerned) and why the originals cannot be produced under the best evidence rule, I am compelled to find that their evidentiary value are worthless.

Secondly, even if they were admissible per se, I would say that it does stretch the court's credibility beyond acceptable bounds to suggest that a person could win on just three numbers, ie 1433, 9425 and 3728, the sum of over $352,000 in the space of six months.

Defence counsel in his final submission contended that if the prosecution did not accept the accused's story on this point, or if the court harboured any doubts as to its veracity the prosecution or the court could

call rebutting evidence presumably under s 425 of the Criminal Procedure Code (FMS Cap 6) ('the Code'). He invited the court to adjourn the case for this further evidence to be called. With respect, the very wide power under s 425 of the Code should be very sparingly used and only in emergency cases. As Tindal CJ said in *R v Frost*:[46] 'the practice should be limited to a case where a matter arises ex improviso, which no human ingenuity can foresee, on the part of the prisoner, otherwise injustice would ensue.'

I think it not insignificant that in his examination-in-chief the accused studiously avoided giving any information of his occupation or means of livelihood. That his ingenuity foresaw that he would be asked about these matters is borne out by the fact that his supporters came to court ready to provide the photostats. The prosecution were equally prepared to cover the ground because they had seized the passbooks exhs P25 and P26 when the accused's house was searched. Section 425 of the Code is not intended to be used to fill up loopholes left behind by the adversaries.

I have observed that the passbook exh P25 in the joint names of the accused and his brother Kang Joo Huat with the Hongkong and Shanghai Banking Corp commenced on 24 July 1980 and ended on 22 January 1982. Two cheques in exh D25 for $11,165 and $11,630 both dated 15 September 1980 and the withdrawal of $39,000 immediately preceding the corresponding figures for 18 September 1980 which appear in the passbook, raise awkward questions. I have not been able to relate any of the other cheques in exh P25 with the figures in either passbook. On 24 January 1982 the balance in passbook exh P25 is $33.61. There are no entries thereafter. The passbook exh P26 in the joint names of Teh Chong Hock and the accused with the Malayan Banking Bhd commences on 26 March 1981 and terminated on 27 August 1982 with a balance of $27.56. There are no entries thereafter. So what happened to the $342,000 and why should the accused let his brother and his brother-in-law have a joint account on his gambling winnings?

As to where all this leaves the court, I consider it unnecessary to speculate whether some sort of laundering operation was going on in 1980 and 1981 or whether as defence counsel suggests, truth is stranger than fiction and the accused did in fact have the luckiest motor cycle number in town. It is the view of this court that what happened nine years ago is so remote as to be irrelevant; I would therefore disregard this evidence as not being of any value to either side.

As to the situation on the day he was arrested I now state it as the view of this court that I do not consider the accused as a witness of truth on the evidence which he gave as to his occupation or his means of livelihood, or his beneficial interest in the car, or his real movements shortly before he was arrested. On each of these points therefore I hold that he cannot be believed because he was evasive, contradictory and wholly lacking in credibility.

He is therefore within a hair's breadth of being convicted. If this case is to be decided on the balance of probabilities, that is the proper verdict here.

However, there is something else which must be taken into account. As part of his final submission, Mr Bachan Singh took great pains to emphasize that it is better that 99 guilty men should get away than one innocent

man should be hanged. This cliche is often heard in our courts. It probably has its origins in an aphorism of the French philosopher Voltaire who said in his work *Zadig* in 1747, 'It is better to risk saving a guilty man than to condemn an innocent one.'

Neither turn of phrase should have any place in a court of law because they tend to tempt those concerned with the administration of justice to take the line of least resistance instead of conscientiously applying the standards of proof laid down by the Evidence Act 1950. The task is whether after considering *all* the evidence before it, the court believes the guilt of the accused to be so probable that any prudent man ought in the circumstances of this particular case to act on the supposition that it exists.

When drug trafficking seems to be getting increasingly rampant and even the death penalty does not seem to deter, I will leave it to those vociferous critics of our laws for preventive detention to speculate how we should effectively deal with dangerous criminals whose guilt would readily be established on a balance of probabilities but not beyond all reasonable doubt because some material witnesses are too terrified even to admit to their own names in the witness box.

I must here recapitulate that PW2 was acting on information he had received the previous night. His conduct at the roadblock suggests that he knew the drugs would be in the boot. If in fact the accused had to be dragged out of the car, would the accused have so willingly incriminated himself as it is alleged he did? On the defence evidence everything the accused is alleged to have said at the scene is inadmissible in law. Nevertheless the conduct of the parties has a bearing on the credibility of the rest of PW2's evidence.

Furthermore in his examination-in-chief in the trial-within-a-trial PW2 said:

> Tertuduh jalan sendiri *dari tempat pemandu kereta* itu ke tempat belakang itu, selepas kami berhentikan kereta itu kali pertama. (Emphasis is mine.)

Previous inconsistent statements, even in a trial-within-a-trial, must be admissible to attack credibility. With such evidence before the court, I am forced to conclude that there is serious doubt whether the accused did in fact get out of the car voluntarily and proceed to the back after PW2 identified himself and said he wanted to search the boot.

It will be recollected that the prosecution put it to PW7 Tan Hock Chai that on 4 March 1989 he had handed the bag (exh P34) and its contents (exhs P 35 to 41) to PW6 Ong Hock Hoe in order that the latter could hand it to the accused.

Bearing in mind that PW2 had his information the previous night, why has the prosecution called no evidence to show how and when the handover took place, if in fact that happened? Is it not reasonable to believe that the accused was being kept under surveillance after the information was received, and certainly on 4 March? The questions put by the DPP suggest he was, before the accused was arrested.

This gap in the prosecution case is quite disturbing. The very large quantity of money found on the accused, and the equally large quantity of drugs in the boot leads one to the irresistible conclusion that we are dealing

with sophisticated crooks who are big fish. If the accused did in fact show no trace of the guilty conduct attributed to him before the boot was opened, the inference is possible that he was set up by other interested parties who wanted him out of the way even if he was associated with them.

As I have said earlier I do not consider the accused to be a truthful person. There is the gravest suspicion that he was involved in the goings-on on that day which he does not care to disclose. But before we take a man's life we must be as absolutely sure as the law will allow that we have got the right man for the right reasons.

In the present case the required standard of proof has not been discharged to my satisfaction. The accused is therefore acquitted and discharged. The exhibits will remain in the custody of the court until further order.

Accused acquitted.

Reported by PS Ranjan